STATE OF MICHIGAN

COURT OF APPEALS

MARY MARGARET BIBLER,

Plaintiff-Appellee,

v

ARCATA INVESTMENTS 2, LLC,

Defendant-Appellant,

and

NATIONAL LOAN INVESTORS, LP,

Defendant-Appellee,

and

CHICAGO TITLE OF MICHIGAN, INC, f/k/a THE TITLE OFFICE, INC,

Defendant.

UNPUBLISHED
December 6, 2005

No. 263024
Calhoun Circuit Court
LC No. 04-003307-CH

Before: Bandstra, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant Arcata Investments 2 (Arcata), appeals by leave granted the trial court's May 16, 2005 order granting summary disposition in favor of plaintiff, quieting title to the subject property in plaintiff, subject to National Loan Investors (National's) mortgage, and denying Arcata's counter-motion for summary disposition. The order appealed also directed that an evidentiary hearing be held to determine the amount of plaintiff's damages on her slander of title claim against defendant Arcata. We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

I. Summary of Facts and Proceedings

This case involves a triangle of innocent parties created when plaintiff's lender, Commonpoint Mortgage (Commonpoint), failed to discharge an existing note and mortgage after plaintiff refinanced her home. Unfortunately for the parties, Commonpoint was forced into chapter 7 bankruptcy[1] soon after the refinancing transaction created the second note and mortgage. The primary issue presented on this appeal is whether Arcata is a holder in due course of the Bibler's first note and mortgage, thereby cutting off defenses plaintiff and National would have against Commonpoint, including prior payment.

On August 4, 1997, plaintiff and her then husband Larry Bibler executed a mortgage (hereafter referred to as mortgage "A" or the "first" mortgage) and a fixed rate (18.9%) balloon note to Commonpoint in the amount of $45,500 covering plaintiff's residential property located in Albion. On August 25, 1998, Commonpoint sold and assigned mortgage "A" and its underlying note, as part of a pool of loans, to Arcata. Arcata did not record this assignment until December 28, 1999.

On September 4, 1998, plaintiff and her then husband executed a second mortgage (hereafter referred to as mortgage "B" or the "second" mortgage) and note to Commonpoint to refinance the first note and mortgage. At closing, the settlement agent (The Title Office), issued a check from the proceeds of the second loan to Commonpoint to pay and discharge mortgage A and its underlying note. Commonpoint, however, did not forward the proceeds of the new loan to Arcata to pay the prior mortgage and note. Rather, Commonpoint kept the proceeds and used them for its own purposes. Mortgage B was recorded on October 2, 1998. On the same day, Commonpoint sold and assigned mortgage B and its note to the Residential Funding Corporation. This assignment was recorded on December 11, 1998. Residential Funding, in turn, sold and assigned the second mortgage to National on March 27, 2000. The assignment was recorded on May 16, 2000.

On October 21, 1998, an involuntary chapter 7 petition was filed against Commonpoint in United States Bankruptcy Court for the Western District Of Michigan. See *In re Commonpoint Mortgage Co*, 283 Bankr 469, 473 (WD Mich, 2002).

The Biblers filed a chapter 13 bankruptcy proceeding on March 3, 1999, which was dismissed on October 21, 1999. Plaintiff filed a new chapter 13 petition as an individual on February 3, 2000. Plaintiff's judgment of divorce from Larry Bibler awarding her the subject property was entered on September 26, 2000, and recorded the next day.

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[1] Commonpoint Mortgage allegedly engaged in predatory lending practices in the so-called "subprime" market, making loans to people with poor credit, and then selling the loans in the secondary market. See *VandenBroeck v Commonpoint Mortgage Co*, 210 F3d 696, 698 (CA 6, 2000), affirming the district court's order remanding to state court a federal action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC 1961 *et seq*. See, also, *In re Commonpoint Mortgage Co*, 283 Bankr 469, 472, 482 (WD Mich, 2002), certifying class action status under Bankruptcy Rule 7023 for claims against Commonpoint in its chapter 7 proceeding by its Michigan loan customers between October 1, 1991 and October 1, 1997, that alleged "Commonpoint: (1) charged fees for services that were never provided; (2) charged excessive fees in breach of Commonpoint's contractual and fiduciary duties; (3) charged 'hidden fees,' which Commonpoint had a fiduciary duty to disclose; (4) charged illegal fees; and (5) committed violations of the Michigan Consumer Protection Act (MCPA)." Here, the balloon note (fixed rate) through which Arcata claims bears interest at yearly rate of 18.9 percent.

Plaintiff's chapter 13 plan was completed on November 20, 2003. Plaintiff had not listed note and mortgage A on her scheduled debts because she believed they had been paid and discharged when note and mortgage B were created. On December 5, 2003, while her discharge was pending, plaintiff filed an adversary proceeding against Arcata's servicing agent (SN Servicing Corp) seeking to determine the validity, priority and extent of mortgage A. Arcata moved to dismiss the adversary proceeding on the ground of lack of jurisdiction. In an opinion dated April 21, 2004, United States Bankruptcy Judge Jo Ann C. Stevenson agreed, finding that a state court should determine which mortgage had priority and whether plaintiff could assert defenses against Arcata such as laches and prior payment. Unpublished Opinion of the United States Bankruptcy Court, Western District of Michigan, issued April 21, 2004 (Chapter 13, No. SK 00-00800; Adversary Proceeding No. 03-81025).

On or about September 15, 2004, Arcata commenced foreclosure on the subject property by advertisement, MCL 600.3201 *et seq*., claiming that on the original $45,500 debt arising from note A there was then due and owing $102,416.48, including interest at 18.9% per annum. Plaintiff filed this action in circuit court on September 16, 2004, alleging that under the common law and statute, 15 USC 1641, she could assert any defenses to foreclosure available to her against Commonpoint, including prior payment. Plaintiff sought an order to restrain foreclosure, to quiet title, and damages for slander of title. On October 13, 2004, the trial court issued a temporary restraining order precluding further foreclosure action until further order of the court.

Subsequently, the parties filed motions and cross-motions for summary disposition. The trial court entertained arguments on the motions on January 31, 2005. Plaintiff and National argued that they were entitled to partial summary disposition because the 1997 note, when read together with mortgage A as one instrument, contained "undertakings" beyond "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges" payable to the "bearer or to order . . . on demand or at a definite time." MCL 440.3104(1). Therefore, plaintiff and National argued the 1997 note and mortgage A could not be a negotiable instrument. For this reason, Arcata could not be a holder in due course, and was subject to all defenses that plaintiff could assert against Commonpoint.

Plaintiff and National further argued that Arcata did not notify plaintiff in writing of its assignment until October 29, 1998, and did not notify the public by recording the assignment until December 28, 1999. Plaintiff and National both claimed to be prejudiced by Arcata's late notices, which came after plaintiff had executed the 1998 note and mortgage B to Commonpoint, and after Commonpoint assigned mortgage B and its note to National's predecessor. Based on the delayed notices, plaintiff and National asserted Arcata was barred from enforcing the mortgage A and its accompanying note by the doctrine of laches.

Arcata argued it had bought a pool of loans without notice that plaintiff's note was in default, i.e., it was a bona fide purchaser for value, or in the language of the Uniform Commercial Code (UCC), a holder in due course. The note met the criteria of a negotiable instrument under MCL 440.3104 because it was payable to order at the time it was issued and payable at a definite time. Arcata argued the undertakings in the mortgage with respect to protecting the collateral did not affect the negotiability of the note, which stands by itself with the mortgage simply following the note as security for the promise to pay. The trial court noted that, in essence, Arcata was asserting that it was plaintiff who must seek relief from an insolvent bankrupt entity (Commonpoint), not Arcata.

As for notice, Arcata argued that it did not have to record its assignment for it to be valid. Further, Arcata claimed to have timely mailed to plaintiff a notice of the assignment within 15 days after the assignment as required by the Real Estate Settlement Procedures Act (RESPA), 12 USC 2605. In support of this argument, Arcata's counsel noted that plaintiff in her deposition acknowledged receiving a writing matching the description of a RESPA notice. But an employee of Arcata's servicing agent stated in an affidavit that the first written communication sent to plaintiff was a "demand letter" on October 29, 1998.

The trial court ruled in favor of plaintiff and National, finding that the note and mortgage A must be read together, and therefore, the note was not a negotiable instrument. Further, the trial court agreed that plaintiff and National were prejudiced by Arcata's delay in giving notice of the assignment from Commonpoint. After the trial court's ruling from the bench on January 31, 2005, an order was not entered until May 16, 2005, when the trial court clarified that it had intended to grant summary disposition in favor of plaintiff on her slander of title claim. The parties stipulated to adjourn a hearing on damages pending resolution of this appeal.

II. Standards of Review

This Court reviews de novo a trial court's decision to grant or deny summary disposition to determine if a party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A party's motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Maiden, supra* at 120. We must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Id*. at 120-121. It is proper to grant summary disposition when no genuine issue regarding any material fact exists and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings standing alone. *Maiden, supra* at 119. The motion must be granted if no factual development could justify plaintiff's claim for relief. *Id*.; *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

We also review de novo the interpretation of statutes and contracts. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). Likewise, we review de novo equitable actions such as to quiet title. *Id*.

III. The Note is a Negotiable Instrument

We find that the trial court erred by ruling the note and mortgage at issue must be read together as one document rendering them nonnegotiable. The UCC controls whether a document is a negotiable instrument. Here, the note satisfies the criteria of a negotiable instrument under the UCC. The UCC permits reference to another document regarding the terms and conditions of a security interest and also provides that acceleration clauses do not affect negotiability.

MCL 440.3104(1) defines a "negotiable instrument" as

> [a]n unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if all of the following apply:
>
> (a) It is payable to bearer or to order at the time it is issued or first comes into possession of a holder.
>
> (b) It is payable on demand or at a definite time.
>
> (c) It does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain an undertaking or power to give, maintain, or protect collateral to secure payment, an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or a waiver of the benefit of any law intended for the advantage or protection of an obligor.

Plaintiff and National do not contest that the note satisfies subparagraphs (a) and (b) but contend when the mortgage is read together with the note as one instrument, the first clause of subparagraph (c) is violated. But MCL 440.3106(2)(a) plainly states that a promise or order is not made conditional (or nonnegotiable) by "a reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration." Thus, reference in the note to a mortgage that secures its payment does not destroy the negotiability of the note. Further, additional conditions in the mortgage, such as maintenance of hazard insurance, escrowing tax and insurance payments, an occupancy requirement, or option to accelerate payment on the transfer or sale of the property, do not destroy the negotiability of the note. Although a mortgage is not a negotiable instrument because it does not contain an unconditional promise or order to pay a sum certain, it does not affect the negotiability of a note because it "merely secures payment of the negotiable instrument." *Mox v Jordan*, 186 Mich App 42, 46; 463 NW2d 114 (1990). Thus, the trial court's analysis is contrary to the UCC.

The trial court's analysis is also contrary to our Supreme Court's decision in *Paepcke v Paine*, 253 Mich 636, 641; 235 NW2d 871 (1931), in which the Court stated the "better rule" for determining negotiability.

> The form of the note or bond may alone be considered in determining its negotiability. The mortgage or trust agreement, unless referred to in a way to incorporate its provisions into the note or bond, is but an incident thereto, and is to be regarded as a security only. If the note or bond contains "an unconditional promise or order to pay a sum certain in money" at "a fixed or determinable future time" and is "complete and regular upon its face," it may be enforced according to its terms.

Moreover, the trial court erred by ruling acceleration clauses in the note and mortgage rendered the note nonnegotiable. Before the adoption of the UCC, an acceleration clause in a note or mortgage did not destroy the negotiability of the note. *Northwest Finance Co v Crouch*, 258 Mich 411, 413; 242 NW 771 (1932), citing *Paepcke, supra*. As adopted in Michigan, the

UCC also recognizes that an acceleration clause will not destroy an instrument's negotiability. MCL 440.3106(2)(a) provides that a reference to an acceleration clause does not make a promise or order conditional, and therefore, nonnegotiable. The official commentary in note 4 reads:

> The section contains no specific language relating to the effect of acceleration clauses on the certainty of the sum payable. Section 2(3) of the original act contained a saving clause for provisions accelerating principal on default in payment of an instalment [sic] or of interest, which led to doubt as to the effect of other accelerating provisions. *This Article* (Section 3--109, Definite Time) *broadly validates acceleration clauses*; it is not necessary to state the matter in this section as well. The disappearance of the language referred to in old Section 2(3) means merely that it was regarded as surplusage. [Emphasis added.]

The UCC provision on definite time referenced in the commentary has been adopted in Michigan as MCL 440.3108(2), which provides:

> (2) A promise or order is "payable at a definite time" if it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued, subject to rights of:
>
> (a) Prepayment.
>
> (b) Acceleration.
>
> (c) Extension at the option of the holder.
>
> (d) Extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

Accordingly, both under prior case authority and Michigan's current version of the UCC, accelerations clauses in the note or mortgage do not destroy the negotiability of the note.

In sum, the note here met the criteria of a negotiable instrument in MCL 440.3104. The note's reference to the mortgage, and additional "undertakings" in the mortgage, do not affect the negotiability of the note. Finally, acceleration clauses in the note and the mortgage do not affect the negotiability of the note. MCL 440.3108(2); *Northwest Finance, supra.* The trial court erred by ruling otherwise.

IV. Holder in Due Course

Next, Arcata argues that because the note at issue was a negotiable instrument, and it took the note for value, in good faith, and without notice it was overdue or dishonored, it was a holder in due course of the note. MCL 440.3302(1). Further, subject to certain exceptions not applicable here, a holder in due course of a negotiable instrument takes free of all defenses the obligor may have against the original holder. MCL 440.3305. Arcata asserts that as a holder in due course of a negotiable note secured by a mortgage, it takes the note and the mortgage free of all equities or defenses the mortgagor may have against the original mortgagee. See *Bronson v Stetson*, 252 Mich 6, 8; 232 NW 741 (1930)("A *bona fide* purchaser in due course of a negotiable instrument takes the mortgage securing it free from all equities and defenses which the mortgagor could have set up against the mortgagee.").

This issue raises a plethora of legal and factual questions that are not yet ripe for this Court to decide. The trial court found that Arcata could not be a holder in due course solely because it ruled that the note and mortgage when read together as one instrument were not negotiable. By definition, one cannot be a holder in due course unless one holds a negotiable instrument. See MCL 440.3302(1)("'holder in due course' means the holder of an instrument . . . ."), and MCL 440.3104(2)("'Instrument' means a negotiable instrument."). The trial court did not decide whether Arcata could be a holder in due course if the note was a negotiable instrument and the mortgage a separate legal agreement. Because the trial court did not decide this issue, appellate review is not appropriate at this time. *Allen v Keatings,* 205 Mich App 560, 564-565; 517 NW2d 830 (1994)("Appellate review is limited to issues actually decided by the trial court."). This is especially the case if the trial court properly applied the doctrine of laches to grant plaintiff equitable relief. If so, whether Arcata is a holder in due course is moot. Again, in general, this Court will not decide moot issues. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

V. Application of the Equitable Doctrine of Laches

General principles of law and equity are applicable to the UCC unless the Code specifically contains a contrary provision. MCL 440.1103; *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 131; 602 NW2d 390 (1999). Further, the equitable remedy of foreclosure is subject to equitable defenses in "unusual circumstances," or in cases of fraud. *Mitchell v Dahlberg,* 215 Mich App 718, 724; 547 NW2d 74 (1996). Here, although plaintiff has raised a colorable claim of laches, National has not. Arcata's failure to record its assignment did not prejudice National because when National's predecessor obtained its assignment of the second mortgage, the first mortgage had been recorded and not discharged. But federal law (RESPA) required that Commonpoint notify plaintiff of the first mortgage's assignment to Arcata "not less than 15 days before the effective date of transfer" and Arcata was required to notify plaintiff "not more than 15 days after the effective date of transfer." 12 USC 2605(b)(2), (c)(2). If plaintiff did not receive either the RESPA "goodbye" or "hello" before refinancing, a factual basis exists for the trial court's finding that this failure resulted in prejudice to her, which, in turn, justifies the trial court's invocation of the doctrine of laches to grant equitable relief.

Laches is an equitable affirmative defense primarily based on changed circumstances, which render inequitable the granting of relief to a dilatory plaintiff. *Yankee Springs Twp v Fox,* 264 Mich App 604, 611; 692 NW2d 728 (2004). Although the alleged dilatory party here is defendant Arcata, it is appropriate for plaintiff to assert the defense to Arcata's affirmative effort to foreclose the mortgage by advertisement. Laches may arise from a party's failure to do what one is required to do by law to protect its rights, which under the circumstances misleads or prejudices an adverse party rendering enforcement of its rights inequitable. *School Dist No 14 v School Dist No 1,* 266 Mich 479, 485-486; 254 NW 174 (1934). Thus, laches may apply where the passage of time combines with a change in circumstances making it inequitable to enforce a claim. *Yankee Springs Twp, supra* at 612. Here, federal law requires that a mortgagor of a "federally related mortgage" be given notice of an assignment of the mortgage at least 15 days before and not more than 15 days after the assignment. 12 USC 2605. The record appears to support the conclusion that plaintiff did not receive a RESPA notice of the assignment of her first mortgage before she granted a second mortgage. Although the time gap between Commonpoint assigning plaintiff's first mortgage to Arcata and plaintiff granting the second mortgage is only 10 days, "'[i]t is the effect, rather than the fact, of the passage of time that may trigger the defense of laches.'" *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 97; 572 NW2d 246 (1997), quoting *Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571, 578; 485 NW2d 129 (1992).

We note that while this Court reviews de novo a trial court's equitable decisions and underlying factual findings for clear error, *Yankee Springs Twp, supra* at 611, the trial court also must exercise its discretion in deciding whether to grant equitable relief in a particular case. *Amster v Stration*, 259 Mich 683, 686-687; 244 NW 201 (1932); *Oosterhouse v Brummel*, 343 Mich 283, 290; 72 NW2d 6 (1955). "Equitable relief by way of cancellation [of a land contract] is not strictly a matter of right, but rather a remedy the granting of which rests in the sound discretion of the court." *Amster, supra* at 686. With respect to granting equitable relief, our Supreme Court in *Youngs v West*, 317 Mich 538, 545; 27 NW2d 88 (1947), quoted 30 CJS, pp 328-329, as follows:

> "Broadly speaking the sound discretion of the court is the controlling guide of judicial action in every phase of a suit in equity. So the granting of equitable relief is ordinarily a matter of grace, and whether a court of equity will exercise its jurisdiction, and the propriety of affording equitable relief, rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case. Of course, this discretion is not an arbitrary one, but must be exercised in accordance with the fixed principles and precedents of equity jurisprudence, and in accordance with the evidence."

As applied to the present case, whether plaintiff was not notified as required by RESPA of the assignment to Arcata of her first mortgage before plaintiff granted the second mortgage is a factual question reviewed for clear error; whether the circumstances here are sufficiently unusual to legally justify equitable relief from foreclosure is reviewed de novo; and whether the trial court properly granted equitable relief must be reviewed for an abuse of discretion.

The trial court, in essence, applied "the broad doctrine that equity regards and treats as done what in good conscience ought to be done." *Haack v Burmeister*, 289 Mich 418, 425; 286 NW 666 (1939)(citation omitted); see, also *Pittsfield Twp v Saline*, 103 Mich App 99; 302 NW2d 608 (1981), quoting 77 Am Jur 2d, Vendor and Purchaser, § 317, pp 478-479. The court succinctly noted the underlying reality of this case was that ultimately either plaintiff or Arcata must seek relief from Commonpoint, an insolvent, bankrupt entity. Arcata's position was that although requiring plaintiff to do so may be harsh, that is what the law required. But what is fair and equitable is that plaintiff's payment to Commonpoint should have discharged the mortgage assigned to Arcata. It addition, plaintiff's payment to Commonpoint should have been forwarded to Arcata. But as between an unsophisticated borrower, plaintiff, and sophisticated money merchants engaged in the business of trading high-interest rate mortgages for investment purposes, it is not an abuse of discretion for the trial court to decide the equities favor plaintiff and to place the risk of loss which occurred in this case with a sophisticated investor, Arcata.

The record is unclear, however, whether the trial court determined as matter of law, because reasonable minds could not differ, that plaintiff did not receive a RESPA notice before granting the second mortgage. Therefore, remand is necessary to clarify this factual issue. Further, the critical time period in this case is the 10 days between the assignment to Arcata of the first mortgage and plaintiff's refinancing by granting a second mortgage. Because the trial court granted relief on the basis of Arcata's delay in giving notice of its assignment, which it categorized as months or years rather than 10 days, remand is also necessary so that the trial court may clarify whether it would still grant equitable relief on the basis of Arcata's failing to notify plaintiff of its assignment before plaintiff granted the second mortgage. In sum, on remand, the trial court must determine: (a) did plaintiff receive a RESPA notice of the assignment of the first mortgage before she refinanced and, (b) if not, was such failure sufficient to move the court to grant plaintiff equitable relief. If the trial court answers each question in favor of plaintiff, we hold that the circumstances of this case are sufficiently "unusual" that it would not be an abuse of discretion for the trial court to grant plaintiff equitable relief on the basis of laches.

In summary, we remand this case to the trial court for further proceedings to clarify whether plaintiff was notified as required by RESPA of the assignment to Arcata before she granted the second mortgage. If the answer is no, the trial court must determine whether the 10-day gap between the assignment and the second mortgage is sufficient to warrant granting equitable relief to plaintiff under the doctrine of laches.

VI. Slander of Title

We find that the trial erred by granting summary disposition on this issue to plaintiff. Instead, the trial court should have granted summary disposition to Arcata because on this record plaintiff cannot establish the necessary element of malice.

Slander of title in Michigan is based on both the common law and statute. MCL 565.108; *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). "To establish slander of title at common law, a plaintiff must show falsity, malice, and special damages, i.e., that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages." *Id*. Malice is the crucial element, which may be either actual or implied. *Glieberman v Fine*, 248 Mich 8, 12; 226 NW 669 (1929); *Gehrke v Janowitz*, 55 Mich App 643, 648; 223 NW2d 107 (1974). Here, plaintiff relies on implied malice, contending Arcata acted intentionally without just cause or excuse. But the record shows that Arcata had a good faith reasonable belief that it was a holder in due course of the note and that it could, therefore, lawfully enforce the mortgage that secured payment of the note it had received by assignment. Because, on this record, plaintiff cannot establish the necessary element of malice, her slander of title claim must fail.

VII. Conclusion

We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are awarded because no party fully prevailed.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Jane E. Markey